Public Prosecutor v Idzhaam bin Shafie

HIGH COURT (ALOR SETAR) — PJK NO 45–16 OF 2004
MOHD SOFIAN ABD RAZAK JC
28 MARCH 2006

Criminal Procedure — Sentence — Appeal against sentence — Possession of dangerous drugs — Principle governing — Whether sentence manifestly excessive — Factors to be considered — Dangerous Drugs Act 1952 ss 6, 39B(1)(a), 39B(2)

The accused was originally charged for trafficking of dangerous drugs to wit, 204 grammes of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act. Before the trial could commence, an amended charge was tendered to one of possession under s 6 and punishable under s 39A(2) of the Act which carries an imprisonment for life or for a term which shall not be less than 5 years and shall also be punished with whipping of not less than ten strokes. The accused pleaded guilty to the amended charge. The accused also admitted the written facts relating to the commission of the offence. The court found the accused guilty as per the amended charge and sentenced the accused to 10 years imprisonment from the date of his arrest. The Court further ordered that the accused be given ten strokes of the rotan. The accused was dissatisfied with the sentence and filed a notice of appeal. In so far as the punishment on the strokes was concerned the accused got the minimum strokes and therefore the appeal was whether the sentence of 10 years imprisonment from the date of his arrest was manifestly excessive.

Held:

(1) The court took into consideration the element of public interest as being the foremost in mind when sentencing. The court also took judicial notice of the increasing number of crime relating to drugs as news of such offences was constantly being reported in the media. The accused was found to be in possession of 204g of cannabis which did not suggest that it was for his own consumption (see para 29). The amount of damage done if the cannabis found its way into the public at large was unthinkable. It would cause hundreds of untold miseries of drug addicts and perhaps death (see para 30).

(2) The gap between the previous conviction and the current offence was a 10 year old gap. However the issue to be considered was what positive steps had been done by the accused to rehabilitate himself. The accused had not rehabilitated himself instead had committed a more serious offence under the Act. The court should strike a balance between public interest and the interest of the accused (see para 34).

(3) With regard to the plea of guilty by the accused, there is no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment. The power of sentencing is a discretionary one and it depends on the facts of each case. The court may refuse to give discounts (see para 35). In this case, if the accused had claimed trial to the amended charge, the court would have imposed on the accused a sentence of 15 years imprisonment (see para 39). In view of the accused's plea of guilty, the right and proper sentence having given the accused a discount of one-third of that sentence was accordingly a term of 10 years imprisonment from the date of his arrest and 10 stokes of the rotan (see para 40).

[Bahasa Malaysia summary

Tertuduh dituduh untuk pengedaran dadah, 204 gm kanabis, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta tersebut) dan boleh dihukum di bawah s 39B(2) Akta tersebut. Sebelum perbicaraan bermula, satu pindaan pertuduhan telah diberikan kepada satu pemilikan dadah di bawah s 6 dan boleh dihukum di bawah s 39A(2) Akta tersebut yang mana hukumannya adalah penjara seumur hidup atau untuk tempoh tidak kurang daripada 5 tahun dan juga akan dihukum tidak kurang daripada 10 sebatan. Tertuduh telah mengaku kesalahan terhadap pindaan pertuduhan. Tertuduh juga telah mengaku kepada fakta-fakta bertulis berkenaan kesalahan tersebut. Mahkamah telah mendapati tertuduh bersalah seperti yang ditunjukkan di dalam pindaan pertuduhan dan telah mengenakan tertuduh kepada 10 tahun penjara dari tarikh penahanan tertuduh. Mahkamah telah memerintahkan tertuduh diberikan 10 sebatan. Tertuduh tidak berpuas hati dengan hukuman dan justeru itu telah memfailkan notis rayuan. Di mana berkenaan dengan hukuman sebat, tertuduh telah menerima sebatan yang paling minima dan oleh itu, rayuan adalah sama ada hukuman penjara selama sepuluh tahun dari tarikh reman adalah terlalu berlebihan.

Diputuskan:

(1) Mahkamah telah mempertimbangkan elemen kepentingan awam sebagai yang terpenting dalam pemikiran semasa memberi hukuman. Mahkamah telah menerima pengiktirafan kehakiman bagi peningkatan tahap jenayah berkenaan dadah kerana berita tentang kesalahan-kesalahan tersebut sentiasa disiarkan di dalam media. Tertuduh didapati berada dalam pemilikan 204 gm kanabis, yang mana, tidak dikatakan untuk kegunaanya sendiri. Jumlah ganti rugi yang boleh dialami jikalau kanabis digunakan oleh orang awam adalah sesuatu yang sukar dipertimbangkan/difikirkan. Ia boleh membawa kesengsaraan kepada penagih- penagih dadah dan kemungkinan kematian (lihat perenggan 30).

(2) Ruang antara sabitan yang sebelumnya dan kesalahan tertuduh sekarang adalah 10 tahun. Akan tetapi, isu yang perlu dipertimbangkan adalah apakah langkah-langkah yang telah diambil oleh tertuduh untuk memulihkan dirinya. Tertuduh belum lagi memulihkan dirinya tetapi telah melakukan kesalahan yang lebih serius di bawah Akta. Mahkamah patut mengimbangi kepentingan awam dan kepentingan tertuduh (lihat perenggan 34).

(3) Berkenaan dengan pengakuan bersalah tertuduh, tidak ada peraturan automatik bahawa pengakuan kesalahan membolehkan tertuduh mendapatkan hukuman yang kurang. Hukuman mahkamah adalah berdasarkan budi bicara dan bergantung kepada fakta-fakta setiap kes. Mahkamah mungkin akan menolak dalam memberi diskaun (lihat perenggan 35). Di dalam kes ini, jikalau tertuduh meminta bicara terhadap pindaan pertuduhan, mahkamah mungkin akan mengenakan tertuduh hukuman 15 tahun penjara (lihat perenggan 39). Hukuman yang betul dalam memberikan diskaun satu pertiga hukuman kepada tertuduh adalah 10 tahun penjara dari tarikh reman dan 10 sebatan rotan (lihat perenggan 40).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 170–172.

Cases referred to

Cobiac v Liddy (1969) 119 CLR 257 (refd)
Mohamad Ang Swee Kang v PP [1988] 1 MLJ 167 (refd)
Melvani v PP [1971] 1 MLJ 137 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Mohd Tajudin bin Ismail [1998] 7 MLJ 542 (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45 (refd)
PP v Sau Soo Kim [1975] 2 MLJ 134 (refd)
PP v Soosainathan [2001] 2 MLJ 377 (refd)
PP v Sulaiman bin Ahmad [1993] 1 MLJ 74 (refd)
PP v Tia Ah Leng [2004] 4 MLJ 249 (refd)
R v Kenneth John Ball [1951] 35 Cr App R 164 (refd)
Rex v Grondkowski [1946] All ER 560 (refd)
Vaughan v Lennie (1981) VR 255 (refd)
Yusmarin bin Samsudin v PP [1999] 4 MLJ 625 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 6, 39A(2), 15A, 12(2), 39B(1)(a), (2)

G Ravishankar (R Shankar Gandhi & Associates) for the appellant.
Nurhafizza Azizan (Deputy Public Prosecutor) for the respondent.

Mohd Sofian Abd Razak JC:

[1] The accused was originally charged for trafficking of dangerous drugs to wit, 204g of cannabis, an offence under s 39B(l)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act. The only penalty prescribed by the Act is death. Fortunately for the accused however, before the trial could commence, the learned Deputy Public Prosecutor, tendered on behalf of the Public Prosecutor an amended charge, exh P3 to one of possession under s 6 and punishable under s 39A(2) of the Act which carries an imprisonment for life or for a term which shall not be less than five years and shall also be punished with whipping of not less than ten strokes.

[2] The amended charge:

> Bahawa kamu pada 20 Jun 2003, pada jam lebih kurang 12.05 pagi di bilik 321 di Hotel Seberang Perak, Jalan Kilang Ais, Alor Setar di dalam daerah Kota Setar, di dalam Negeri Kedah Darul Aman telah didapati memiliki dadah berbahaya iaitu cannabis seberat 204 gm dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39A(2) Akta yang sama.

[3] The amended charge was read and explained to the accused who having understood the amended charge and the nature and consequences of pleading guilty to the amended charge, nevertheless, pleaded guilty to the charge.

[4] The accused also admitted the written facts relating to the commission of the offence exh P4 as being true and the exhs tendered by the prosecution, namely police report No 10956/03 as exh P5, sketch plan and key as exh P6A and P6K respectively, four copies of photographs exhs P7A–D, four copies of photographs exhs P8A - D, chemist report no makmal (PG) for 2002/03-0 dated 2 October 2003 exh P9, one black colour helmet exhibit P10, one envelope with sticker (PG) for 2002/03-0 exh Pll, small black bag exh P12, one small transparent plastic wrapper containing an aluminium foil exh P13, one black plastic bag exh P14, plant material in the plastic bag with marking no makmal (PG) for 2002/03-0 Jabatan Kimia exh P15.

[5] The court found the accused guilty as per the amended charge and sentenced the accused to ten years imprisonment from the date of his arrest, that is 20 June 2003. The court further ordered that the accused be given ten strokes of the rotan.

[6] The accused is dissatisfied with the sentence and has filed a notice of appeal. In so far as the punishment on the strokes is concerned the accused got the minimum strokes and therefore the appeal is whether the sentence of ten years imprisonment from the date of his arrest was manifestly excessive.

[7] Before passing the sentence, the court considered the accused's plea in mitigation made on his behalf by his learned counsel, Mr Ravishankar and the submissions of the learned DPP Cik Nurhafizza Azizan.

[8] In mitigation, Mr Ravishankar submitted that the accused had pleaded guilty and the court in assessing sentence ought to consider such a plea as a mitigating factor (*Melvani v Public Prosecutor* [1971] 1 MLJ 137), and thereby saved the time of the court and of others involved in the case (*Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134). He further submitted that a plea of guilty was a mitigating factor even if the offender was shown to be a hardened criminal (*Public Prosecutor v Sulaiman bin Ahmad* [1993] 1 MLJ 74).

[9] The accused was at the time of his arrest aged 32 years, married with two children aged eight years and six years respectively and also looking after his aged mother of 70 years old. It was further submitted that the accused was only in

possession of 204g of cannabis which is 4g more in weight than the prescribed amount for the presumption of trafficking under s 37(vi) of the Act that is 200g or more in weight of cannabis.

[10] The accused had expressed his remorsefulness over his action and gave his undertaking to the court that he will not be involved in any offence in the future.

[11] Mr Ravishankar had further urged the court to impose a lenient sentence on the accused and submitted to the court a list of cases with the particulars of sentences for the same offences as committed by the accused as decided by the High Court in Alor Setar namely:

(1) Alor Setar Criminal Trial No 45-1-00
Public Prosecutor v Zulkifli bin Rejab
Weight 5749g of ganja
Sentences 10 years from date of arrest and 10 strokes
Coram Dato' Wan Adnan bin Muhamad J

(2) Alor Setar Criminal Trial No 45-12–01
Public Prosecutor v Mohd Shafri bin Hj Idris
Weight: 266.6g of cannabis
Sentences: 7 years from date of arrest and 10 strokes
Coram: Dato' Hasan bin Lah J

(3) Alor Setar Criminal Trial No 45–32–01
Public Prosecutor v Bakarin bin Ahmad
Weight: 376g of cannabis
Sentences: 8 years from date of arrest and 10 strokes
Coram: Dato' Zainal Adzam bin Abd Ghani J

[12] Mr Ravishankar referred the court to the case of *PP v Ravindran & Ors* [1993] 1 MLJ 45 where Visu Sinnadurai J held that

> the court should also have regard to certain accepted principles or guidelines so as not to have too great a disparity in sentence for the same offence. These guidelines were discount or credit for the plea of guilty; comparison of sentences in other court in other cases for a similar offence; disparity of sentence amongst accused persons and mitigating factors relevant to the present case. It is an accepted rule of practice that an accused should be given credit or discount for pleading guilty. This is because public time and money will be spared if an accused admits his guilt. The credit or discount to be given to an accused person is not on the maximum sentence imposed by law but rather on a sentence which would have been imposed on the accused if he had claimed trial and been found guilty.

[13] The learned DPP Cik Nurhafizza Azizan in her submission however underlined the seriousness of the offence and the public interest and asked for an appropriate but deterrent sentence to be passed. Reference was made to the case of*Tia Ah Leng v Public Prosecutor* [2004] 4 MLJ 249 where she submitted that the exceptions to the general rule that when imposing a sentence, the court should take into consideration the fact that an accused person who has pleaded guilty be given certain credit and discount does not include offences under the Dangerous Drug Act

1952. The learned DPP further submitted that the accused had one previous conviction under s 15(A) of the Act (exh P16) where upon Mr Ravishankar informed the court that it was an offence committed in 1996 almost ten years ago and when the accused was unmarried.

[14] Before passing the sentence, the court considered the accused's plea in mitigation made on his behalf by his learned counsel and the submissions of the learned DPP.

[15] The first and most important factor which the court must take into consideration before imposing any sentence is that of public interest and the protection of the society.

[16] In a well known and oft quoted case of *R v Kenneth John Ball* [1951] 35 Cr App R164 where Hilbery J had stated:

> In deciding the appropriate sentence a court should always be guided by certain consideration. The first and foremost is the public interest The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible.
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> Such a sentence may also deter the particular criminal from committing crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

[17] Lord Godderd LCJ in *Rex v Grondkowski* [1946] All ER 560 had this to say:

> The judge must consider the interest of justice as well as the interest of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interest of the prisoners.

[18] Thus, it is clear from the above passages that the court takes into consideration the element of public interest as being the foremost in mind when sentencing.

[19] In the case of *Yusmarin bin Samsudin v Public Prosecutor* [1999] 4 MLJ 625 at p 627, Siti Norma Yaakob JCA (as she then was) said:

> The principles of sentencing have long been entrenched and well settled in our criminal law jurisprudence and a court seized with such jurisdiction is empowered to take into account the following considerations:

(1) the extent and seriousness of the offence committed;

(2) the guilty person's antecedents; and

(3) the public interest factor.

[20] The court takes judicial notice of the increasing number of crime relating to drugs as news of such offences are constantly being reported in the media.

[21] It has to be noted that the legislature had thought it fit to increase the punishment for offence under s 39A(2) of the Act from a maximum of 14 years imprisonment to life imprisonment and the minimum term of imprisonment from three to five years and the minimum strokes increased from six to ten strokes. The legislative exercise therefore denotes the concern of the government in combating the drugs menace in the country.

[22] In *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256, Hashim Yeop Sani J (as he then was) refer to this phenomena *as the degenerating effect of the misuse of dangerous drugs and the attendant dangers it has posted to society itself.*

[23] I share the same sentiment as expressed by Hashim Yeop Sani J (as he then was) in that unless the court takes a firm stand in such offences, the intention of Parliament as embodied in s 39A(2) of the Act may not materialize.

[24] The court takes the view in that the possession by the accused of 204g in weight of cannabis is an offence under s 39B(l)(a) and punishable under s 39B(2) if the learned DPP had not tendered an amended charge under s 6 and punishable under s 39A(2) of the Act.

[25] The amount of dangerous drugs in this case exceeds three times the minimum weight of 50g as provided under s 39A(2)(f) of the Act.

[26] In the case of *Soosainathan v Public Prosecutor* [2001] 2 MLJ 377 Augustine Paul J (as he then was) stated at p 388:

> It has been repeatedly stressed that in cases involving possession of drugs the weight of the drugs found on a person plays a significant role in assessing sentence (see *Zaidon Shariff v Public Prosecutor* [1996] 4 CLJ 441).

[27] In the case of *Soosainathan* the accused was in possession only of 0.07g monoacetylmorphine and it was suggested that the possession of the drugs was for his own consumption.

[28] However in an earlier case of *Public Prosecutor v Mohd Tajudin bin Ismail* [1998] 7 MLJ 542 Augustine Paul JC (as he then was) held that the accused had been found in possession of 429.7g of cannabis. This is not a small amount by virtue of the minimum weight to attract the application of the section under which he was charged. It is also obvious that the accused had no defence.

A **[29]** In the case before the court, the accused was found to be in possession of 204g of cannabis which does not suggest that it was for his own consumption.

[30] The court is of the view that the amount of damage done if the cannabis found its way into the public at large is unthinkable. It would cause hundreds of **B** untold miseries of drug addicts and perhaps death. There is always no shortage of buyers for this 'sought after commodity' which is like signing their own death warrants. Therefore I see no merit in the submission of the learned counsel on this point.

C **[31]** The court also considered the previous conviction of the accused under s 15 of the Act which was committed ten years ago and whether it is relevant in the sentencing process.

[32] Previous convictions are only relevant for two reasons namely, it defeats any **D** claim or inference that the accused is a first offender or is of prior good character for the purpose of any general plea in mitigation (see *Cobiac v Liddy* (1969) 119 CLR 257). Secondly, whether the previous conviction is relevant for the purpose of subjecting the accused to any statutory requirement to an increased punishment for the second or subsequent offences (see *Vaughan v Lennie* (1981) VR 255).

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[33] However, the Dangerous Drugs Act 1952 does not have a provision for an increased punishment for the second or subsequent offences unlike the provision in s 75 of the Penal Code when an offender has previously been convicted of an offence under Chapter XII or under Chapter XVII of the Code.

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[34] The court takes the view that as a general principle of sentencing the accused's character and antecedent can be referred to in determining the sentence to be passed on to the accused. In the case before the court, the gap between previous conviction and the current offence is ten years. However the issue to be considered is what **G** positive steps had been done by the accused to rehabilitate himself. I am of the view that the accused had not rehabilitated himself instead had committed a more serious offence under the Act. The court should strike a balance between public interest and the interest of the accused.

H **[35]** With regard to the guilty plea of the accused, there is no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment. The power of sentencing is a discretionary one and it depends on the facts of each case. The court may refuse to give discounts in sentences as can be seen in the case of *PP v Tia Ah Leng* where the accused pleaded guilty to an offence under s 12(2) of the Dangerous Drugs Act 1952 punishable under s 39A(2) thereof for having been in possession of **I** 13,749.8g of heroin. That unusually large amount of dangerous drugs was about 2,749 times the minimum weight of fiveg prescribed under s 39A(2)(a) of the Act. The High Court refused to treat his plea of guilty as a mitigating factor, instead sentenced the accused to life imprisonment, the maximum sentence provided for the offence.

[36] At this juncture it is useful perhaps to consider a passage by Augustine Paul J (as he then was) in *Tan Lay Chen v Public Prosecutor* [2001] 1 MLJ 135 at p 140:

> It must not be overlooked that the general rule is that an accused should be given a lesser punishment for pleading guilty. There can, as I have said, be a departure from this general rule. However, there must be good reasons for doing so. In that event the reasons for such departure must be kept in mind. If, therefore, a sentence is imposed without taking into consideration a guilty plea then the reasons for doing so must be explained by the sentencer. This is because an accused person expects the general rule to operate in his favour when he pleads guilty. The grounds of judgment must therefore show why the guilty plea cannot, on the facts of the case, be considered as a mitigating factor.

[37] The court had also taken into consideration the fact that when an accused person had pleaded guilty he is entitled to a discount between one quarter and one third of the sentence. In *Mohamad Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167 Mohamad Azmi SCJ in delivering the judgment of the court said

> It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence.

[38] In the case before the court the accused is charged under s 6 and punishable under s 39A(2) of the Act. The maximum sentence the court could impose is an imprisonment for life or for a term which shall not be less then five years and shall also be punished with whipping of not less then ten strokes.

[39] However, the court is of the view that if the accused had claimed trial to the amended charge, the court would have imposed on the accused a sentence of 15 years imprisonment.

[40] In view of the accused's plea of guilty the court is of the opinion that the right to a proper sentence having given him a discount of one-third of that sentence, accordingly sentenced the accused to a term of ten years imprisonment from the date of his arrest and ten stokes of the rotan in the hope that 'his memory of the clanging of prison gates' will keep him from this crime in the future.

Accused sentenced to 10 years imprisonment and 10 strokes of rotan.

Reported by Peter Ling